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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re Marriage of JOYCE ANN and GARY  
HENRY LANDI.

H034151  
(Santa Clara County  
Super. Ct. No. 1-04-FL118478)

JOYCE ANN LANDI,

Respondent,

v.

GARY HENRY LANDI,

Appellant.

In this family law matter the trial court originally ordered appellant Gary Henry Landi to pay spousal support of \$3,500 per month to respondent Joyce Ann Landi. Gary<sup>1</sup> appealed from that order and this court reversed, remanding the matter with directions that the trial court reconsider its determination of the marital standard of living, make findings pertaining to the parties' relative needs and Gary's ability to pay, and enter a new order for spousal support. (*In re Marriage of Landi* (Nov. 16, 2007, H030619) [nonpub. opn.] (*Landi I*)). On remand, the trial court revised its determination of the marital standard of living, made findings as directed, and ordered Gary to pay Joyce

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<sup>1</sup> "As is customary in family law cases, we refer to the parties by their first names for purposes of clarity and not out of disrespect." (*Kuehn v. Kuehn* (2000) 85 Cal.App.4th 824, 828, fn. 2.)

permanent spousal support of \$2,880 per month. Gary appeals again. We find no error and affirm.

## **I. FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>**

Joyce and Gary separated in 2003 after a lengthy marriage of 38 years. During most of the marriage Gary had been employed by Walgreen's as a pharmacist. He had received substantial overtime and bonus pay during the last years of the marriage and additional income of around \$20,000 per year from his private consulting business, the Landi Company. Joyce had done light bookkeeping for the Landi Company and had been employed outside the home from time to time but not since about 1991 or 1992. At the time of trial Joyce was 60 and Gary was 61 years old.

It was undisputed that during their marriage Joyce and Gary had been living beyond their means. Calculations from the financial experts on both sides showed that the parties had paid for their living expenses with credit cards and covered any shortfall with proceeds from a home equity line of credit. Gary's earning ability was reduced in 2003 when he was transferred to a lower volume Walgreen's store where only minimal overtime was available and bonuses were half of what they had been at the store in which he had been working during the marriage. Landi Company income had also dwindled.

After separation Joyce had taken a job that paid approximately \$2,080 per month. She used cash she had acquired from the division of the marital property to purchase a new home so that she could live without a mortgage payment, a decision one expert determined to be reasonable given Joyce's age and limited earning potential. Joyce's expert, James F. Butera estimated that Joyce's income from investments after the purchase of a new residence (which she had estimated would cost around \$600,000)

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<sup>2</sup> We take our factual statement from the statement of facts in the opinion filed in *Landi I* as well as from the reporter's transcript of the trial, of which we have taken judicial notice.

would be about \$1,040 per month. Butera did not consider any income from Joyce's retirement accounts because it was his opinion she should preserve those for future needs as she had no other source of income. By the time of trial, Joyce had entered into a contract for the purchase of a new residence for \$465,000.

Following trial and posttrial briefing, the trial court determined that the marital standard of living was equal to an income of \$7,500 per person per month and set permanent spousal support for Joyce at \$3,500 per month. This court concluded in Gary's first appeal that the trial court had reached this result through a misinterpretation of the evidence. It appeared that the court had inadvertently set the marital standard based upon the couple's expenses during marriage rather than their income. (*Landi I, supra*, at pp. 9-10.) Since Gary and Joyce had been living beyond their means while married, the parties agreed that income, not marital expenses, was the more reasonable way to calculate the marital standard of living.

We concluded, "On remand, the trial court should reconsider its determination of the marital standard of living, having in mind the evidence presented at trial. The trial court should also articulate its findings with respect to Gary's ability to pay and the parties' reasonable needs, using the marital standard of living as a point of reference and giving that factor only such weight as the trial court deems appropriate under the circumstances. (See *In re Marriage of Cheriton* [(2001)] 92 Cal.App.4th [269,] 307.) The trial court shall then set the award of spousal support at the amount that, in its discretion, the trial courts finds is appropriate." (*Landi I, supra*, at p. 12.)

For guidance of the trial court on remand, our opinion in *Landi I* addressed several of Gary's other contentions. Gary had argued, based upon *In re Marriage of Smith* (1990) 225 Cal.App.3d 469 (*Smith*), that it was error, as a matter of law, to include any overtime earnings in the determination of the marital standard of living. We rejected the argument, explaining that *Smith* had not held that a court may never consider overtime. (*Landi I, supra*, at p. 11.) We also rejected Gary's contention that Butera was not

qualified to give an opinion on the reasonable rate of return on conservative investments. As to Gary's contention that the court erred in determining the dollar amount of the principal Joyce had available to generate income, we left that for the trial court to decide. (*Ibid.*)

Our disposition of the first appeal stated, in pertinent part: "The trial court's order of July 14, 2006, is reversed. The trial court is instructed to vacate its order to the extent it incorporates its determination of the marital standard of living and the amount of spousal support set forth in the trial court's tentative decision of April 7, 2006. The trial court shall reconsider its determination of the marital standard of living and the amount of spousal support in light of the opinions expressed herein."

## **II. THE ORDER FOLLOWING REMAND**

Following our decision in *Landi I*, the trial court allowed the parties to brief the issues for decision. Thereafter, the trial court issued a "Tentative Decision and Statement of Decision After Remand," in which the court accepted the recommendation of Gary's expert Catherine Wiehe, who had concluded that "a 'reasonable' standard of living calculated with [Gary] working 'at a reasonably human pace' " was the appropriate marital standard of living. The court rejected the marital standard calculated by Butera because it included "large amounts of overtime that do not represent a 'reasonably human pace' " and did not account for Gary's transfer to a low-volume store in 2003.

Relying upon Gary's pay stubs and his January 2006 income and expense declaration, the court calculated Gary's wages based upon a regular 40-hour work week and 2.5 hours of weekly overtime. The court noted that during the marriage Gary had been working 10 to 20 hours of overtime each two-week pay period (5 to 10 hours per week). Since his 2003 transfer, Gary had been able to work only half the overtime he had previously worked. Accordingly, the trial court reduced the overtime component by cutting the lower figure in half. Including Gary's declared average monthly bonus and Butera's estimates of Gary's average monthly dividends, interest, and his current income

from the Landi Company (\$250 per month, roughly 15 percent of what it had been during the marriage), the court found Gary's actual monthly income to be \$11,985.29. The court concluded that this amount reflected a reasonable marital standard of living of approximately \$6,000 per person.

The court went on to find that Joyce did not have the earning capacity to maintain the marital standard of living. The court noted that in its first order it had increased Butera's estimate of Joyce's investment income based upon the court's presumption that the purchase of a residence for \$465,000 (rather than the originally estimated \$600,000) would give Joyce more money to invest. But upon re-examining Butera's calculations, the court realized that Butera's calculations assumed that Joyce would use \$429,776 (the value of one certificate of deposit) for the purchase of the residence. Accordingly, the court accepted Butera's estimate of investment income of \$1,040 per month, which, together with her wages of \$2,080 per month, would leave Joyce \$2,880 per month short of the marital standard. Deducting \$2,880 from Gary's current income would leave him with a gross monthly income of \$7,297--\$1,297 more than the marital standard.<sup>3</sup>

The trial court concluded that a "reasonable" standard of living was \$6,000 per month per person, and that Joyce's needs, "in light of the marital standard, call for permanent spousal support to be set at \$2,880.00 per month . . . [and that Gary] has the ability to pay this amount and still meet his needs according to the reasonable marital standard calculated herein."

No written objections to the statement of decision appear in the record. Thus, the trial court's tentative decision was made an order of the court filed on February 23, 2009. This timely appeal followed.

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<sup>3</sup> The trial court calculated Gary's income for purposes of determining his ability to pay a bit differently than it calculated his income for purposes of determining the marital standard of living, even though the court relied upon the January 2006 income and expense declaration for both. The discrepancy is not material to our discussion.

### III. RULES OF PROCEDURE ON REMAND

It is helpful to recall that the instant appeal is from an order made on remand following an earlier appellate decision. In proceedings on remand, the scope of what the trial court may decide is circumscribed by the terms of the remand order. “The order of the reviewing court is contained in its remittitur, which defines the scope of the jurisdiction of the court to which the matter is returned.” (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 701.) Thus, when an appellate court’s reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and must be followed and the trial court wholly lacks jurisdiction to act outside the scope of those directions. (*Hampton v. Superior Court* (1952) 38 Cal.2d 652, 655-656.) Where the remittitur incorporates by reference directions contained in the body of the opinion, “the trial court . . . is bound by the incorporated portions as if they were included as an express specific direction on remand.” (*Puritan Leasing Co. v. Superior Court* (1977) 76 Cal.App.3d 140, 143.) Any portion of the opinion not so incorporated will, to the extent it establishes a rule of law necessary to the decision, be law of the case. (*Ibid.*) The law of the case doctrine requires that, when a reviewing court “states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal.” (*Tally v. Ganahl* (1907) 151 Cal. 418, 421; see also *People v. Stanley* (1995) 10 Cal.4th 764, 786.)

### IV. CONTENTIONS

Gary makes three arguments on appeal. First, he argues that the trial court again erred by including any overtime in its calculation of the marital standard of living and that the court did not expressly find that the marital standard it established was based upon Gary’s working at a reasonable human pace.

Second, Gary argues that in assessing his needs, the trial court did not take into consideration the amount he contributes toward his father's medical care.

Third, Gary maintains that the trial court did not accurately calculate Joyce's needs because it failed to attribute to her the income she could have had if she had chosen to borrow money to purchase her residence or to take money out of her deferred compensation plans.

Joyce responds that Gary's first and third arguments are barred because they were decided in *Landi I*. As to the second argument, she notes that Gary did not raise the issue of his father's medical care in his first appeal or with the court on remand and, therefore, that he has waived the argument. In any event, she maintains, Gary's father died in 2006 so that Gary no longer has that expense.

## **V. DISCUSSION**

### *A. Legal Framework and Standard of Review*

Family Code section 4330<sup>4</sup> authorizes a trial court to order a party to pay spousal support in an amount, and for a period of time, that the trial court determines is just and reasonable, based upon the standard of living established during the marriage, taking into consideration the circumstances set forth in section 4320 et seq. (§ 4330, subd. (a).)

The marital standard of living "is a general description, not intended to specifically spell out or narrowly define a mathematical standard." (*Smith, supra*, 225 Cal.App.3d at p. 491.) *Smith* defined the marital standard as "reasonable needs commensurate with the parties' general station in life." (*Ibid.*) The reference point may be the actual marital standard of living, i.e., the actual expenditures during the marriage, but that is not always the most appropriate measure. (*Id.* at p. 484.)

Although section 4330, subdivision (a) requires the trial court to make the spousal support order "based on the marital standard of living," the court is required to take into

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<sup>4</sup> All statutory references are to the Family Code unless otherwise specified.

account the circumstances set forth in section 4320 and the sections that follow it. Two of the circumstances set forth in section 4320 are pertinent here. They are: “The ability of the supporting party to pay spousal support, taking into account the supporting party’s earning capacity, earned and unearned income, assets, and standard of living” and “The needs of each party based on the standard of living established during the marriage.” (§ 4320, subds. (c) & (d).) After weighing the statutory factors, the trial court “may fix spousal support at an amount greater than, equal to or less than what the supported spouse may require to maintain the marital standard of living, in order to achieve a just and reasonable result under the facts and circumstances of the case.” (*Smith, supra*, 225 Cal.App.3d at p. 475.)

Thus, while the trial court is bound to consider the statutory guidelines, the ultimate decision rests within the court’s broad discretion. “ ‘A trial court’s exercise of discretion will not be disturbed on appeal unless, *as a matter of law*, an abuse of discretion is shown--i.e.,--where, considering all the relevant circumstances, the court has “exceeded the bounds of reason” or it can “fairly be said” that no judge would reasonably make the same order under the same circumstances.’ ” (*Smith, supra*, 225 Cal.App.3d at p. 480, quoting Hogoboom & King, Cal. Prac. Guide: Fam. Law (Rutter 1989) § 6:79, p. 6-96.14.)

*B. Overtime*

To the extent Gary argues that it is error to include any amount of overtime in determining the marital standard of living, Joyce is correct that the issue was decided in *Landi I*. We held in *Landi I* that a marital standard that includes some amount of overtime is not *per se* unreasonable. Thus, this argument is barred by the law of the case doctrine.

To the extent Gary argues that the trial court failed to make an express finding that the marital standard was based upon Gary’s working a reasonable human pace, his argument is defeated by the record. By expressly adopting Wiehe’s recommendation that



the marital standard be calculated with Gary “working ‘at a reasonably human pace’ ” and by expressly concluding that a marital standard of living of \$6,000 per person per month was “reasonable,” the court necessarily found that the amount reflected Gary’s working at a reasonable human pace. Nothing more was required.

Gary makes the conclusory argument that the figure represents “an excessive number of hours.” But we cannot say, as a matter of law, that 2.5 hours of overtime per week, plus whatever time it would take to produce \$250 per month of income from the Landi Company, is excessive as a matter of law. Accordingly, we find no abuse of discretion.

*C. Gary’s Father’s Medical Expenses*

Gary reported a monthly expense of \$1,700 for his father’s medical care on his January 2006 income and expense declaration. Gary maintains that the trial court’s order did not take this amount into consideration and that this failure violated our remand order. We disagree. The trial court found that, after Gary paid Joyce a monthly amount of \$2,880, Joyce would have an amount that would meet the marital standard of living and that Gary would have \$1,297 per month more than the marital standard. The trial court was not required to accept any of Gary’s claimed expenses; trial courts must “remain ever vigilant to exaggeration and falsification.” (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 362.) Indeed, Gary concedes that he has not incurred the expense since his father died, which, according to Joyce, was in August 2006. We conclude that the trial court made the findings our remittitur required, exercising its discretion by placing its emphasis upon the marital standard of living rather than upon individual expenses.

*D. Joyce’s Needs*

Stated succinctly, Gary’s final argument is that the trial court did not correctly calculate Joyce’s income. Gary maintains that the trial court erred in accepting Butera’s opinion of the reasonable amount of income Joyce would realize from her existing

investments because Joyce could have taken a mortgage on her residence and invested the cash she would have saved. He also argues that since Joyce was old enough to draw upon her retirement savings without penalty, the court should have attributed that additional income to her. Joyce argues that we have decided this issue in *Landi I*.

We did hold in *Landi I* that the trial court appropriately accepted the expert's opinion on what would be a reasonable return on conservative investments. However, we deferred consideration of the value of the principal Joyce had available to invest so that that issue was before the trial court on remand and Gary is entitled to challenge it.<sup>5</sup> Arguably, the issue was related only to the additional amount Joyce would have to invest as a result of her having purchased a residence for less than the \$600,000 she originally estimated. As the trial court's order on remand makes clear, the actual purchase price of the residence did not significantly alter Butera's estimate as the court had initially believed.

Assuming that the trial court had jurisdiction to reconsider other aspects of Joyce's investments, we find no abuse of discretion. Gary suggests that the trial court was required to impute to Joyce investment returns based upon assumptions other than those made by her accounting expert. There is no such requirement. As we have explained, the trial court's decision is a discretionary one. Equitable considerations predominate and it is up to the trial court to make an order it deems to be fair and reasonable. In calculating Joyce's needs, the trial court chose not to impute income to her based upon what she could have done with her money. Rather, the court carefully examined and accepted Butera's calculations, which were based upon the assumption that it was

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<sup>5</sup> We did not hold, as Gary suggests, that Joyce's investment income must be calculated based upon an across-the-board, 4 percent return on everything she owned. We merely held that the trial court was entitled to rely upon Butera's opinion of the reasonable rate of return on investments since his training and experience as a certified public accountant was adequate to qualify him for that purpose.

reasonable for Joyce, who had a limited earning capacity and was nearing retirement age, to own her residence outright and to defer drawing down her retirement savings before it became necessary to do so. This evidence supports the court's express finding that Joyce needed \$2,080 per month to maintain the marital standard. Thus, the trial court made the required findings, which are supported by the record; there was no abuse of discretion.

**VI. DISPOSITION**

The judgment is affirmed.

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Premo, Acting P.J.

WE CONCUR:

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Elia, J.

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Duffy, J.